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18 Attorneys for Defendant  
 19 AMERICAN AIRLINES, INC.

20  
 21 UNITED STATES DISTRICT COURT  
 22  
 23 NORTHERN DISTRICT OF CALIFORNIA  
 24  
 25 SAN FRANCISCO DIVISION

26 EDWARD E. ANDERSON,  
 27 Plaintiff,  
 28 v.  
 29 AMR The parent of AMERICAN  
 30 AIRLINES INC, AMERICAN AIRLINES,  
 31 and DOES 1 through 5 INCLUSIVE,  
 32 Defendants.

33 Case No. 07-cv-3527 WHA

34 DEFENDANT AMERICAN AIRLINES,  
 35 INC.'S INITIAL AND IMMEDIATE  
 36 OPPOSITION TO PLAINTIFF'S NOTICE  
 37 OF MOTION AND MOTION TO ALLOW  
 38 PLAINTIFF TO FILE FIRST  
 39 AMENDMENT [SIC] COMPLAINT;  
 40 MEMORANDUM OF POINTS AND  
 41 AUTHORITIES

42 Date: May 29, 2008  
 43 Time: 8:00 A.M.  
 44 Courtroom: 9

45 Honorable: William Alsup

1       As the Court is aware, Defendant American Airlines (“Defendant” or “American”) has  
 2 previously filed its Motion for Summary Judgment and/or Summary Adjudication of Claims and/or  
 3 Judgment on the Pleadings which is set to be heard at the above-indicated time and place. Even  
 4 though Plaintiff failed to file any opposition or statement of non-opposition to the instant motion,  
 5 Plaintiff improperly filed with the Court a “Notice of Motion and Motion to Allow Plaintiff to File  
 6 First Amendment [sic] Complaint,” which purports to schedule a hearing on the same date as the  
 7 hearing on Defendant’s Motion. Plaintiff’s Motion appears to have been filed by hand on May 13,  
 8 2008, and was faxed by Plaintiff’s counsel to the undersigned on said date, but then was apparently  
 9 electronically filed on May 14, 2008. (Docket # 33).<sup>1</sup> This opposition is filed immediately in order  
 10 to preserve American’s rights concerning this motion even though proper, timely notice was not  
 11 given by Plaintiff as discussed below.

12       As an initial matter, this improper motion acknowledges that Defendant’s Motion is pending  
 13 and that Plaintiff is aware of it. His motion makes the statement that “this motion is scheduled for  
 14 hearing in a timely fashion at the same time as Defendant’s Motion for Summary Judgment on  
 15 May 29, 2008.” (Pl. Motion, Doc. # 33, 2:5-6). Plaintiff’s motion further states that “the motion is  
 16 made in a timely manner to be heard with Defendants’ [sic] motion for summary judgment...” (Pl.  
 17 Motion, Doc. # 33, 5:8-9). In addition, Plaintiff’s counsel’s declaration in support of his improper  
 18 motion makes the same acknowledgement that he is aware of the Defendant’s pending motion.  
 19 (Affidavit of Frederick C. Roesti in Support of Motion, Doc. # 34, ¶ 11).<sup>2</sup>

20       The Court should deny Plaintiff’s new motion out of hand because it is in violation of every  
 21 deadline imposed by this Court and by Local Rules, as set forth hereafter. However, if the Court  
 22 declines to do so, it should give American its full right to brief and oppose this untimely and  
 23 improper motion to show that it is: (1) based on a false premise, (2) would greatly expand the factual

24       <sup>1</sup> Electronic notice of the filing of said document was emailed to counsel on May 14, 2008.

25       <sup>2</sup> Plaintiff’s counsel faxed a letter to the undersigned’s associate in a totally different office on May 13 asking for a copy  
 26 of Defendant’s motion to be faxed to him claiming to be “internet illiterate.” Defendant did fax a copy of the moving  
 27 papers to plaintiff’s counsel but submits that counsel’s request for a fax copy is a ruse. This matter has long been  
 28 designated as an electronic filing case and counsel is registered with the court’s electronic filing program. In addition, a  
 review of the court’s records on PACER shows that he has appeared in this court in 11 different matters as counsel of  
 record, including one in which he also represented this Plaintiff (Anderson v. Ogden Aviation Svc. et. al, # 96-cv-00962-  
 SI). He also states in his Affidavit that he has practiced employment law for 30 years. (Roesti Affidavit, Doc. # 34, ¶  
 14). He is fully familiar with federal court practice, especially in this District.

1 and legal issues to be tried, (3) prejudice Defendant, and (4) delay the trial herein. Specifically, if  
 2 the Court does not deny Plaintiff's belated motion for the innumerable scheduling violations  
 3 committed by Plaintiff as are discussed below, American requests that it be allowed full and fair  
 4 time to respond to the untimely motion to show that the reasons asserted by Plaintiff as to what now  
 5 prompted him to file his motion are incorrect, that his purported new claim fails to state facts on  
 6 which he may obtain relief, to obtain and present evidence showing that the conduct about which he  
 7 now complains is in full compliance with California law, to show that there is no issue to be tried  
 8 which would be material to the new claim, and, if needed, to present evidence and witnesses at trial  
 9 concerning American's baggage fee, how its passengers are informed that the fee is not for the  
 10 skycaps service, and a whole host of issues needed to defeat Plaintiff's alleged and belated claim for  
 11 a violation of a California Labor Code provision regarding tip income. Such a claim has nothing to  
 12 do with his current claims of age discrimination or discrimination based on race, including his claim  
 13 that the fee was instituted as a form of unlawful discrimination. Adding such a claim would  
 14 substantially delay the case because it would completely shift the case from one based on unlawful  
 15 discrimination to one based on a company wide policy. However, if the Court does not reject  
 16 plaintiff's untimely and improper request out of hand for the reasons discussed below, American  
 17 should be allowed additional time to fully brief this issue.

18 With that alternative request made, Defendant notes that when the parties filed their *Joint*  
 19 Statement Pursuant to Federal Rules of Civil Procedure 26(f) (Doc. # 13), both sides stated they did  
 20 not believe any amendments to the pleading would be made. (Doc. # 13, 4:1-2). When the Court  
 21 issued its Case Management Conference Order herein, Doc. # 16, the Court ordered that any leave to  
 22 amend the pleadings must be sought by October 31, 2007. (Doc. # 16, ¶ 2). The Court's Case  
 23 Management Conference Order required all fact discovery to be completed by March 7, 2007. (Doc.  
 24 # 16, ¶ 4).<sup>3</sup> The Case Management Conference Order further required all dispositive motions to be  
 25 filed by April 24, 2008. (Doc. # 16, ¶ 9). The Local Rules of this Court also require any party

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 27 <sup>3</sup> Plaintiff's motion makes the false statement that "in the present case, Plaintiff and Defendants are still in the discovery  
 28 phase of the case, although Defendant has filed a motion for summary judgment." Thus, he again acknowledges  
 awareness of the pendency of the instant motion and falsely states that the parties are still within the period to conduct  
 discovery.

1 seeking relief from the Court's Case Management Conference Order to first confer with opposing  
 2 counsel concerning the desired change and file certain pleadings regarding these efforts. (Local  
 3 Rule 16-2(d)). Plaintiff has done none of this. Nor has Plaintiff come remotely close to meeting the  
 4 standard he must meet in order to obtain such relief from the Court's Case Management Conference  
 5 Order. Once such scheduling order is made, no later amendment of pleadings is permitted unless the  
 6 Court first modifies the scheduling order to permit such amendment. To obtain such modification,  
 7 "good cause" must be shown (see FRCP 16(b)(4)). *Johnson v. Mammoth Recreations, Inc.* 975 F2d  
 8 604, 609 (9th Cir. 1992); *Hargett v. Valley Fed'l Sav. Bank* 60 F3d 754, 761 (11th Cir.  
 9 1995)(“compelling reasons” why amendment could not have been presented earlier); *S & W*  
 10 *Enterprises, L.L.C. v. SouthTrust Bank of Alabama*, NA 315 F3d 533, 536 (5th Cir. 2003)

11 Finally, Local Rule 7-2 requires all motions to be made on at least 35 days' notice, except  
 12 under circumstances which do not pertain hereto. Plaintiff's motion, which was filed either on  
 13 May 13 or May 14, 2008, clearly was not filed 35 days in advance of Plaintiff's intended motion  
 14 hearing date of May 29, 2008. In a nutshell then, Plaintiff has violated every possible deadline and  
 15 timing rule under which he needed to seek leave to amend his pleading from the Court.<sup>4</sup> If the Court  
 16 does not reject Plaintiff's request out of hand, American respectfully requests that it be given full  
 17 and fair opportunity to present to the court the many additional substantive reasons why the belated  
 18 amendment is improper.

19 Dated: May 15, 2008

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/s/

22 KENNETH R. O'BRIEN  
 23 LITTLER MENDELSON  
 24 A Professional Corporation  
 25 Attorneys for Defendants  
 26 AMR THE PARENT OF AMERICAN  
 27 AIRLINES INC AND AMERICAN  
 28 AIRLINES

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4 This Court's Case Management Conference Order clearly states that no delays in trial preparation or trial because of ADR will be countenanced. ( Doc. # 13, ¶ 13.)